

March 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency

The Honorable R.D. James
Secretary of the Army
Department of the Army, Civil Works

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460
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Re: Revised Definition of “Waters of the United States,” Docket ID No. EPA-HQ-OW-2018-0149

Dear Administrator Wheeler and Assistant Secretary James:

The undersigned members of the New Jersey State Legislature representing the residents of New Jersey, submit the following comments on the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers’ (Corps) proposed Revised Definition of “Waters of the United States.” We urge the Agencies to withdraw this dangerous Dirty Water Rule proposal, which is expected to eliminate Clean Water Act protections for more than half of the nation’s wetlands and thousands of miles of streams, including sources of drinking water.

Congress passed the Clean Water Act in 1972 in order to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” and for decades, the Clean Water Act safeguarded nearly all of our rivers, streams, lakes, and wetlands. The proposed Dirty Water Rule is a drastic departure from Congress’s direction, from long-standing policies, and from the protections our water resources and communities need. If the Agencies continue to move forward with this scheme it will be the most severe weakening of clean water protections since the Act’s inception.

The Agencies (EPA and Corps) are proposing to drastically limit which water bodies the Clean Water Act protects from pollution. Under this proposal Clean Water Act protections would likely be cut for thousands of miles of streams, roughly half of the nation’s wetlands, and other critical water bodies. This would leave them without guaranteed protection under the Clean Water Act’s pollution control, prevention, and clean-up programs. The Agencies claim their proposed definition is based in law, but limiting Clean Water Act protections to only waters with a permanent or consistent flow or with a direct surface hydrological connection to other waters, has previously been rejected by a majority of Supreme Court Justices, by the George W. Bush administration, and by courts interpreting the Act.

Even worse, for the first time in the history of the Clean Water Act, the Agencies are proposing to end protections for critical water resources such as ephemeral (rain-dependent) streams, which have been in place for decades. Though ephemeral streams may only flow after a rain storm or snow melt, they provide water for larger streams and rivers, filter pollutants and capture nutrients, and provide critical habitat for wildlife. Categorically excluding all ephemeral streams from protections is a dramatic departure from decades of regulatory practice that followed science and common sense to protect our nation’s water resources.

The proposal would supposedly continue protections for intermittent streams. But how the Agencies propose to determine whether or not a specific stream would be covered is confusing. For instance, the Agencies assert that for an intermittent stream to be protected, it must flow continuously for “certain times of a typical year,” but they do not explain what might qualify as “certain times,” and information needed to determine what the flow is in a “typical year” could be very difficult to obtain. Because of these and other confusing elements of the proposal, it is difficult to know exactly how many streams the Agencies are proposing to eliminate from protection.

We are also troubled the Agencies are inviting polluters to request even more severe rollbacks, such as whether or not the rules should exclude all streams that don't flow-year round. Such a radical departure from decades of clean water policy would wipe out protections for over half of the streams across the country. There is no scientific basis for excluding these streams from protection. We believe that all streams, regardless of size or frequency of flow, should be safeguarded from pollution or destruction, because the science demonstrates that they serve critical functions in protecting clean water and reducing flood damage for downstream communities.

The Agencies' proposal would also be a disaster for our nation's wetlands. The proposal would only include wetlands that literally abut or have some other surface water connection to other protected waters. This would automatically exclude approximately half of the nation's wetlands from Clean Water Act protections and abandons decades of previous regulatory practice. Excluding so many wetlands from Clean Water Act protections is reckless because it ignores the critical functions these resources perform. Wetlands protect the water quality of entire watersheds by filtering pollutants, storing floodwaters and reducing flood flows that can threaten property, people, and infrastructure, and providing essential fish and wildlife habitat.

Since the Clean Water Act was passed in 1972, we have made significant progress in cleaning up many of our nation's most treasured rivers. The Dirty Water Rule would allow oil and gas companies, real estate developers, and factory farmers to pollute and destroy many of these streams and wetlands, reversing that progress. Instead of giving a free pass to polluters, the Agencies should be doing more to ensure these streams and wetlands are safeguarded in order to better protect and restore the rivers, lakes, and bays on which all communities depend.

As state legislators, we believe broad federal protections are critical to protecting our local waters. Water flows downhill, and each of the lower 48 states have water bodies that are downstream of one or more other states. Maintaining consistency among water pollution programs throughout these states is essential. Since the passage of the Clean Water Act, states have come to rely on the Act's core provisions and have structured our own water pollution programs accordingly.

As state elected officials, we urge the Agencies to swiftly withdraw this proposal, which would gut Clean Water Act protections for certain streams and most wetlands.

Sincerely,

NJ Senate

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Nilsa Cruz-Perez (D-5)
Troy Singleton (D-7)
Vin Gopal (D-11)
Linda Greenstein (D-14)
Shirley Turner (D-15)
Christopher 'Kip' Bateman (R-16)
Bob Smith (D-17)
Patrick Diegnan (D-18)
Joe Vitale (D-19)
Joe Cryan (D-20)
Thomas H. Kean Jr. (R-21)
Richard Codey (D-27)
Robert Singer (R-30)
Nia Gill (D-34)
Nellie Pou (D-35)
Loretta Weinberg (D-37)

NJ Assembly

Matthew Milam (D-1)
Bruce Land (D-1)
Herb Conaway Jr (D-7)
Carol Murphy (D-7)
Daniel Benson (D-14)
Andrew Zwicker (D-16)
Joe Daniels (D-17)
Nancy Pinkin (D-18)
Jamel Holley (D-20)
Nancy Munoz (R-21)
Jon Bramnick (R-21)
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